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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-2581

PAUL W. BRIGGS,
Superintendent of Schools, *et al.*,
Petitioners,

vs.

VANESSA CALLOWAY,
A Minor, by her mother and next friend,
INEZ CALLOWAY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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A Minor, by her mother and next friend,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing, with one Judge dissenting, a decision of the United States District Court for the Northern District of Ohio, Eastern Division, which had dismissed respondent's complaint.

CITATION TO OPINIONS BELOW.

The opinion of the United States Court of Appeals is as yet unreported. It is set forth in the Appendix, *infra*, at pp. 21-37. The opinion of the District Court is also not reported, and is set forth in the Appendix, *infra*, at pp. 17-20.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on May 24, 1971. A delayed motion for a rehearing and suggestion for a hearing *en banc* was denied on July 19, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. On a motion to convene a three-judge court pursuant to 28 U.S.C. § 2281, is the District Judge forbidden to consider uncontroverted and admitted facts appearing in affidavits filed in opposition to the motion, which facts clearly disclose that the motion is frivolous, because his authority is limited to a consideration only of the unsworn allegations, whatever they may be, in the complaint?

The District Court answered this question "No." The Court of Appeals, by a divided court, answered "Yes." Petitioners contend the answer should be "No."

2. Is a District Judge forbidden to apply and follow the provisions of Rule 43(e) of the Federal Rules of Civil Procedure when considering a motion to convene a three-judge court pursuant to 28 U.S.C. § 2281?

The District Court answered this question "No." The Court of Appeals, by a divided court, answered "Yes." Petitioners contend the answer should be "No."

3. Is a District Judge in the Northern District of Ohio forbidden to apply and follow the provisions of Rules 2(a)(2) and 2(a)(3) of that Court's local rules (which permit the filing of documents in addition to affidavits) when considering a motion to convene a three-judge court under 28 U.S.C. § 2281?

The District Court answered this question "No." The Court of Appeals, by a divided court, answered "Yes." Petitioners contend the answer should be "No."

4. Does a Court of Appeals have jurisdiction over the subject matter of an appeal from an order of a single District Judge which denied a motion to convene a three-judge court and dismissed plaintiff's complaint? This question was not considered by the Court of Appeals. Petitioners contend the answer should be "No."

RULES INVOLVED.

Federal Rules of Civil Procedure Rule 43(e).

Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Rules of the United States District Court, Northern District of Ohio, Rules 2(a)(2), 2(a)(3).

(2) The moving party shall serve and file with his motion a brief written statement of reasons in support of the motion and a list of citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all photographs or documentary evidence he intends to present in support of the motion in addition

to the affidavits required or permitted by the Federal Rules of Civil Procedure.

(3) Each party opposing the motion shall serve and file within ten days thereafter a brief written statement of reasons in opposition to the motion and a list of citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all documentary evidence or photographs which he intends to submit in opposition to the motion in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

Plaintiff, a minor in public school, filed a complaint for declaratory and injunctive relief and damages, to be determined by a three-judge court pursuant to 28 U.S.C. § 2281, on the ground that an Ohio Statute violated the Fourteenth Amendment of the United States Constitution.

The statute, Ohio Revised Code § 3313.66 provided for the expulsion of a public school student prior to a hearing.

Plaintiff had been expelled for bringing a stolen, loaded handgun to school for the announced purpose of killing, or wounding, four named fellow students.

Prior to the expulsion, and apart from the statute, the school authorities had held an administrative hearing to determine the facts. The District Judge, on the motion to convene the three-judge court, held that the administrative hearing satisfied the procedural due process requirements of the Fourteenth Amendment and, finding no other Constitutional issues, dismissed the complaint.

Plaintiff appealed to the Sixth Circuit Court of Appeals on the sole ground that the District Court had no

right to consider the facts of the administrative hearing because those were disclosed by uncontroverted, sworn affidavits filed in opposition to the motion for a three-judge court.

Plaintiff's sole contention in the Court of Appeals, upon which she prevailed, was that judicial precedent, in spite of the Rules of Civil Procedure, prevented the District Court, on the motion for a three-judge court, from considering the affidavits, the record, or anything except the unsworn allegations in the complaint. Plaintiff did not question the adequacy of the administrative hearing nor dispute the accuracy of the facts disclosed by the affidavits, although opportunity was afforded for both.

With one judge dissenting, the Court of Appeals agreed with plaintiff and reversed. The majority opinion of the Court of Appeals admits that the result is administratively absurd, and even suggests that once the three-judge court is convened it can promptly, either on a motion for summary judgment or "after a few minutes of sworn testimony" is offered, dismiss plaintiff's complaint. But the Court of Appeals insisted the three-judge court must first be convened before anything other than the allegations of the complaint may be considered. The majority recognized the inconvenience of the result but asserted that its remedy is a matter for Congressional rather than Judicial action.

There is nothing in 28 U.S.C. § 2281 which limits a District Court's consideration of facts on convening a three-judge court to the allegations in the complaint.

REASONS FOR GRANTING THE WRIT.

The petition for certiorari should be granted because the decision below is contrary to a decision of this Court, contrary to a contemporaneous decision of three other judges of the same Circuit, and contrary to decisions of a number of other Circuits. Further, the decision below severely limits the inquiry of a District Judge in considering motions for three-judge courts, opens the door for widespread abuse of what is already a grave administrative problem, imposes an almost overwhelming burden on Federal judicial administration, and departs from the accepted and usual course of judicial proceedings, calling for an exercise of this Court's power of supervision.

If the decision below is allowed to stand, any allegations in any complaint which seeks the convening of a three-judge court must be taken as true, and such three-judge court must be convened, offer injunctive relief pending a hearing, and hold a hearing, before the absurdity or frivolous nature of the allegations can even be inquired into.

1. The decision below conflicts with the decision of this Court in Dombrowski v. Pfister.

It is clear from the opinion in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), that affidavits and other documents, submitted by plaintiff in support of a motion for a three-judge court, are properly to be considered in the granting of that motion.

> "Supported by affidavits and a written offer of proof, the complaint further alleges . . . ." 380 U.S. at 482.

The three-judge panel in *Dombrowski* convened and dismissed the complaint. This Court reversed and remanded,

on the ground that the state statutes challenged by plaintiffs were "void on their face" and plaintiffs were entitled to injunctive relief.

The *Dombrowski* opinion clearly authorizes a single judge to consider matters other than the complaint, raised by affidavit, in the *granting* of a three-judge panel. The opinion of the Sixth Circuit in the case at bar proffers no reason, nor can there be, why affidavits may be considered in granting, but not in denying, a three-judge court.

2. The decision below directly conflicts with a nearly contemporaneous decision of three other judges of the Sixth Circuit in Jones v. Branigin.

After the case below had been argued before the Sixth Circuit but prior to its decision thereon, three other judges of the same Court, in October 1970 decided, by a unanimous court, the case of *Jones v. Branigin,* 433 F.2d 576 (6th Cir. 1970).

Jones v. Branigin affirmed the decision of a District Judge which denied a motion to convene a three-judge court. Speaking for a unanimous court, Chief Judge Phillips of the Sixth Circuit pointed out the considerable increase in motions seeking three-judge courts, the strain which this created on the Federal judicial system and the consequent necessity of careful examination, by District Judges, of such motions. He said:

> "In Phillips v. United States, 312 U.S. 246, 250, 61 S. Ct. 480, 483, 85 L. Ed. 800, the Supreme Court recognized that the requirement of a three-judge court 'entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice.'

> "This serious drain upon the federal judicial system has become more and more acute since the decision in *Phillips* in 1941. According to the reports of the Director of the Administrative Office of the United States Courts in the period from 1955 to 1959, there was an average of 48.8 three-judge cases filed per year; from 1960 to 1964 the average per year increased to 95.6 cases; in 1964 the total number of such cases filed was 119; in 1970 the number increased to 291." 433 F.2d at 577.

A review of the District Court opinion in *Jones v. Branigin,* quoted in the Court of Appeals' appendix, 433 F.2d at 579-81, discloses that the District Judge there considered not only the complaint but "the files and records," including the record in a companion case, *Jones v. Hare,* to reach his decision.

Thus, District Judges in the Sixth Circuit today find themselves in a dilemma. *Jones v. Branigin* says they can consider the files and records in ruling on motions to convene three-judge courts. But this instant case, decided a few months later, says they cannot.

In the meantime, complaints and motions seeking three-judge courts may be expected to proliferate, limited only by the ingenuity of the bar, and free from challenge until after the administrative machinery of the Federal bench has brought forth the required three judges.[1]

---

[1] Although a motion for a rehearing and suggestion that it be considered *en banc* was filed in the case at bar, it was filed four days after rule and seems to have been denied (by the two judges who considered it) on that basis. See Appendix, *infra,* at p. 39.

3. The decision below directly conflicts with many decisions from other Circuits.

A review of case law from other Circuits discloses that, as a matter of course, District Judges have never limited their consideration of the sufficiency of a complaint seeking a three-judge court to the allegations in the complaint.

The following cases are illustrative:

Faustino v. Immigration and Naturalization Service, 302 F. Supp. 212 (S.D.N.Y. 1969); *aff'd on other grounds,* 432 F.2d 429 (2d Cir. 1970); *cert. denied,* 401 U.S. 921 (1971).

On plaintiff's motion to convene a three-judge court to challenge the constitutionality of a provision in the Immigration and Naturalization Act, and a motion for summary judgment by the defendant, the District Judge denied plaintiff's motion and granted summary judgment. Concerning the record before him, he said:

> "The operative facts which form the basis of this litigation are not placed in dispute by the affidavits of the parties." 302 F. Supp. at 213.

Bishop v. Golden, 302 F. Supp. 502 (E.D.N.Y. 1969).

The case was heard on defendant's motion for summary judgment dismissing the complaint and denying a motion for convening a three-judge court. The District Judge granted the motion for summary judgment and denied the motion for convening a three-judge court. He determined that the constitutional issue was insubstantial, on the basis of defendant's affidavit. Thus, the opinion states:

> "Defendant has supported his motion for summary judgment with an affidavit in which he recites, among other things . . . ." 302 F. Supp. at 507.

The court goes on to point out that under Rule 56(e) of the Rules of Civil Procedure, when a motion for summary judgment is supported by affidavits, the adverse party may not rest upon mere allegations in his pleadings but his response, by affidavit or otherwise, must set forth specific facts.

The court in *Bishop* thus permits a single judge to hear a defendant's motion for summary judgment to dismiss a complaint for a three-judge court. The court below, parenthetically, said this could not be done.

Offerman v. Nitkowski, 248 F. Supp. 129 (W.D.N.Y. 1965); *aff'd on other grounds,* 378 F.2d 22 (2d Cir. 1967).

The District Judge, in this action challenging the constitutionality of school desegregation orders, dismissed plaintiffs' complaint and denied their motion for a three-judge court on the ground that no substantial federal question was presented. The District Court expressly based its decision on matters other than plaintiffs' complaint:

> "On the pleadings, the exhibits annexed thereto, and the representations and statements by counsel for plaintiffs, the court finds no claim presented for which relief can be granted." 248 F. Supp. at 131.

Bryan v. Federal Open Market Committee, 235 F. Supp. 877 (D. Mont. 1964).

Defendants moved to dismiss, or alternatively for summary judgment on, plaintiff's complaint seeking a three-judge court. The court granted the motion to dismiss in reliance, *inter alia,* upon defendants' affidavit. The court states:

> "The motion [to dismiss] is supported by an affidavit of the assistant secretary of the Federal Open Market Committee." 235 F. Supp. at 878.

Dale v. Hahn, 311 F. Supp. 1293 (S.D.N.Y. 1970).

District Judge Cooper denied a motion to convene a three-judge court and granted defendants' motion to dismiss on the usual ground that no substantial constitutional question was involved. The court's decision is based, primarily, upon proof by defendants, by a document submitted with their motion to dismiss, that plaintiff had received notice of certain challenged state court proceedings. While plaintiff's complaint denied that plaintiff received such notice, the court pointed out that no affidavit from plaintiff supported such denial. 311 F. Supp. at 1297.

To the contrary, in the case at bar, the court below held that the District Judge was *required* to rely on the allegations in the complaint and *forbidden* to consider affidavits.

Dale v. Hahn is directly contrary to the case at bar.

Johnson v. Lee, 281 F. Supp. 650 (D. Conn. 1968).

Chief Judge Timbers, in this opinion, relies on affidavits and exhibits and on affidavits filed *in another case,* introduced by stipulation of the parties, to deny a motion to convene a three-judge court and enjoin pending state court criminal proceedings, 281 F. Supp. at 652, 656. Indeed, in the same case, the Court comments on the failure of plaintiffs to offer any affidavits to support the "totally conclusory allegations" in their complaint. 281 F. Supp. at 656.

Contrary to this, the Court below, in the case at bar compels District Judges in the Sixth Circuit to rely *only* on the "totally conclusory allegations" in the complaint and forbids them even to consider affidavits.

Allegheny Airlines, Inc. v. Fowler, 261 F. Supp. 508 (S.D.N.Y. 1966).

In a suit by plaintiff airlines, seeking a declaratory judgment concerning the powers of a state statutory commission, the single District Judge on his own motion raised and ruled on the necessity of a three-judge panel. While pointing out that no injunctive relief was sought, he held that, as a single judge, he could determine that no substantial constitutional issue had been raised and, in doing so, he relied upon an affidavit submitted by defendants. 261 F. Supp. at 510.

Burmeister v. New York City Police Dept., 275 F. Supp. 690 (S.D.N.Y. 1967).

District Judge Tenney, in this case, dismissed plaintiffs' motion for the convening of a three-judge court. He decided that no substantial constitutional question was involved. His decision was based upon the consideration of affidavits submitted by both plaintiffs and defendants, as follows:

> "Plaintiffs, in their complaint, and in an affidavit by their counsel submitted in support of the instant motion, allege three incidents in which one or more of the plaintiffs were directly involved and two incidents not involving plaintiffs. Defendant Police Commissioner has submitted an affidavit with respect to each of the above mentioned incidents." 275 F. Supp. at 695-96.

The opinion of the Court below in this case is contrary to every one of the cases cited above, and ignores the history of construction of Section 2281 focused on sound principles of judicial administration:

> "The single judge has long been empowered to decide whether a particular cause of action requires adjudication by a three-judge court. In discharging this duty the judge will determine the sometimes

difficult questions of whether the complaint alleges federal unconstitutionality, whether an injunction is sought against a state officer, and whether a state statute or administrative order is under attack. *The statute might have been construed to require the district judge to convene a three-judge court to make this threshold determination any time a plaintiff presented a colorable case for section 2281 action. Such an alternative, however, would have involved too great an expenditure of judicial resources at too early a stage in litigation.*" Note, "The Three-Judge District Court: Scope and Procedure Under Section 2281," 77 HARV. L. REV. 299, 307 (1963) (emphasis added, footnote omitted).

4. The decision below carves out an unwarranted and administratively absurd exception to the clear language of Rule 43(e) of the Rules of Civil Procedure.

Rule 43(e) of the Rules of Civil Procedure provides as follows:

> "*Evidence on Motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Other provisions in the Federal Rules contemplate use of affidavits as evidence on motions. For example, Rule 12(b) provides for such procedure when, on a motion to dismiss for failure to state a claim upon which relief can be granted, "matters outside the pleading are presented to and not excluded by the court." Rule 6(d), dealing with the time for hearing on motions supported by affidavits, provides, "when a motion is supported by affidavit, the affidavit shall be served with the motion : . . ." *Cf.* Rules 56(c), 59(c). Even the Federal Rules of Ap-

pellate Procedure contemplate the use of affidavits. Rule 27(a).

The Sixth Circuit has specifically held that the use of affidavits in support of motions is permitted by the Rules of Civil Procedure, *Switzer Brothers, Inc. v. Byrne*, 242 F.2d 909, 912 (6th Cir. 1957):

> "The use of affidavits in support of motions is recognized in the Federal Rules of Civil Procedure, rule 6(d), 28 U.S.C. and the verification of motions by affidavit is the general practice."

5. The decision below is contrary to long-standing Local Rules of the Northern District of Ohio and carves out an unwarranted exception to that rule for motions to convene a three-judge court.

In support of Rule 43(e) of the Federal Rules of Civil Procedure, the U. S. District Court for the Northern District of Ohio has provided, by Rules 2(a)(2) and 2(a)(3), as follows:

> "(2) . . . If the motion requires the consideration of facts not appearing of record, [the moving party] shall also serve and file copies of all photographs or documentary evidence he intends to present in support of the motion in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure.
>
> "(3) . . . If the motion requires the consideration of facts not appearing of record, [each party opposing the motion] shall also serve and file copies of all documentary evidence or photographs which he intends to submit in opposition to the motion in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure."

Must the Judges of the Northern District of Ohio now amend these rules by adding "except on motions for the convening of a three-judge court"? The opinion below seems to require it.

6. The Court below had no jurisdiction over the subject matter of the appeal.

The question of want of jurisdiction over the subject matter was not raised before the Court of Appeals. However, such want cannot be waived and will be raised and considered by the Supreme Court on its own motion. *Louisville & Nashville Railroad Company v. Mottley,* 211 U.S. 149 (1908); *United States v. Griffin,* 303 U.S. 226 (1938).

In *Louisville & Nashville Railroad Company v. Mottley,* when there was found to be no diversity or federal question basis for subject matter jurisdiction, the Supreme Court ruled:

> "We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion. *Mansfield, &c. Railway Company v. Swan,* 111 U.S. 379, 382; *King Bridge Company v. Otoe County,* 120 U.S. 225; *Blacklock v. Small,* 127 U.S. 96, 105; *Cameron v. Hodges,* 127 U.S. 322, 326; *Metcalf v. Watertown,* 128 U.S. 586, 587; *Continental National Bank v. Buford,* 191 U.S. 119." 211 U.S. at 152.

In *Stratton v. St. Louis Southwestern Ry. Co.,* 282 U.S. 10, 15-16 (1930), this Court ruled:

> "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct ap-

peal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court."

The appropriate procedure which respondent should have followed would have been a petition to this Court for a writ of mandamus. *Id.* at 16; *Ex parte Poresky*, 290 U.S. 30 (1933).

CONCLUSION.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION AND ORDER OF DISTRICT COURT.

No. C 70-27.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

VANESSA CALLOWAY, etc.,
Plaintiff,
v.
PAUL W. BRIGGS, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER.

BATTISTI, *C.J.*

This is an action for injunctive, declaratory relief and damages, pursuant to 42 U.S.C., § 1983. The action seeks to enjoin enforcement of Ohio Revised Code, § 3313.66 on the ground that the statute denies plaintiff due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, in that it authorizes the expulsion of students from public school without notice and the right to a prior hearing. Before the Court is plaintiff's motion for a three-judge court under 28 U.S.C., § 2281.

A three-judge court must be convened when the Complaint seeks to enjoin enforcement of a state statute on the ground that it violates the Constitution of the United States. *McNeese v. Board of Education,* 373 U.S. 668 (1962); *Dixon v. Alabama State Board of Education,* 186 F. Supp. 945, 950 (1960). But, in determining whether a three-judge court should be convened, the district judge, sitting alone, may determine beforehand whether the Court has jurisdiction and whether there is a

substantial federal question presented. *Booker v. State of Tennessee Board of Education*, 240 F.2d 689 (C.A. 6, 1957); *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Ex Parte Poresky*, 290 U.S. 30, 54 S. Ct. 3, 4 (1933).

What constitutes a substantial federal question is somewhat elusive. However, it is well settled that the district judge should scrutinize the Complaint to ascertain whether a substantial question is presented; and that "the district court clearly has authority to dismiss for want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933). Having examined the Complaint, the defendants' Answer and supporting affidavits, the Court is persuaded that the facts in this case reveal that the constitutionality of Ohio Revised Code, § 3313.66 is not directly involved in a determination of the merits.

Plaintiff, Vanessa Calloway, a student at East Technical High School, a public school in the Cleveland School District, had in her possession on the premises of the school on October 20, 1969, a loaded 22 caliber revolver. (Affidavit of Breaux Palmer.) The revolver was taken from her possession, and she was escorted to the office of the Administrative Assistant, Mr. John Noah. To Mr. Noah the plaintiff admitted possessing the revolver and having the purpose to use it on certain named persons if the occasion warranted. (Affidavit of John P. Noah.) Mr. Noah advised her that she was suspended from school for ten days pending an investigation. (Affidavit of John P. Noah.) Thereafter, on October 21, 1969, Dr. Paul W. Briggs, Superintendent of the Cleveland Public Schools, being advised of the incident, made an independent investigation of the facts. (Affidavit of James H. Misch.) On

October 23, 1969, Dr. Briggs advised Mrs. Calloway, mother of the plaintiff, that plaintiff was expelled from East Technical High School, pursuant to Section 3313.66 of the Ohio Revised Code, for possession of the loaded 22 caliber revolver on October 20, 1969. (Affidavit of Paul W. Briggs.)

The facts reveal that plaintiff was not denied her right to a public education by arbitrary governmental action. The requirements of procedural due process "under any given set of circumstances must depend upon the nature of the proceeding involved and the rights that may possibly be affected by that proceeding." *Madera v. Board of Education*, 386 F.2d 778, 780 (1967). No case has held that "trial type hearing requirements apply to such proceedings" as school expulsion matters. *Id.* at p. 784. In *Dixon v. Alabama State Board of Education*, 294 F.2d 150, *cert. den.* 368 U.S. 930 (1961), the Fifth Circuit Court of Appeals proposed numerous standards to protect the rights of students. In essence, plaintiff was accorded all of these protections: She was informed of the specific charges against her in Mr. Noah's office; she was given an opportunity to be heard, and voluntarily admitted possessing the loaded revolver; she knew her accuser and was entitled to defend herself. The conference in Mr. Noah's office on October 20, 1969, may be said to have been a hearing. The plaintiff confessed to a violation which, in itself, was sufficient to warrant the school authorities in taking firm disciplinary action. It is difficult to perceive what more could have been done to adequately protect plaintiff's rights in this situation.

It must be noted that the defendants acted in a situation which could be deemed an emergency. There appears to be numerous instances where weapons have been confiscated from students on school premises. One

student has been shot and killed recently by another student. (Affidavit of Noah.) The threat of violence in the Cleveland Public Schools is ever present. In this situation, defendants were warranted in taking firm and immediate action against this plaintiff. The removal of a potential threat of violence is a reasonable reaction, and not arbitrary government action. Plaintiff's possession of a dangerous weapon created an emergency situation. Manifestly, the school authorities were not obligated to conduct a formal adversary hearing before taking action to remove this threat. Rather, the Court concludes that plaintiff was given the kind of hearing that the emergency required.

When the emergency had passed, i.e., the plaintiff had been prohibited from the school premises, defendants notified plaintiff that she may request a formal hearing on the question of her expulsion. On December 4, 1969, the Director of Pupil Personnel of the Cleveland Public Schools advised counsel for plaintiff that a hearing could be held within three days after the request. (Affidavit of James H. Misch.) No such request was ever made. (Affidavit of Misch; Affidavit of Dr. Paul W. Briggs.) These facts belie the allegation of a denial of due process in Vanessa Calloway's particular case.

The constitutionality of Ohio Revised Code, § 3313.66 is not at issue in this case. The Court finds that plaintiff received an adequate hearing in conformity with due process standards. There is not, then, a substantial federal question presented in this Complaint. There appears, moreover, to be no other grounds upon which jurisdiction can be based. Accordingly, the Complaint must be dismissed.

FRANK J. BATTISTI,
Chief Judge.

OPINION OF THE COURT OF APPEALS.

No. 20471

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VANESSA CALLOWAY,
a minor by her mother and next friend,
Plaintiff-Appellant,

v.

PAUL W. BRIGGS,
Superintendent of Schools, Cleveland School District,
and
DANIEL O. CORRIGAN, ARNOLD R. PINKNEY, WILLIAM F. BOYD, WILLIAM NAGY, GEORGE DOBREA, JOSEPH H. GALLAGHER AND GERALD F. SWEENEY,
the Board of Education, Cleveland School District,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

Decided and Filed May 24, 1971.

Before: EDWARDS and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

EDWARDS, Circuit Judge. This appeal apparently contains some dramatic background facts, but the legal issue which we have to decide is a quite prosaic one: Did this complaint require decision by a three-judge federal court rather than by a single District Judge? Since we believe that it did, we do not reach the merits of the dispute which gave rise to the case.

The complaint filed in this case alleged in part:

"1. This is an action for declaratory and injunctive relief and for damages pursuant to Title 42, U.S. Code, Section 1983 to secure relief against the enforcement of Section 3313.66 Ohio Revised Code, for the reason that said statute denies the plaintiff due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution in that it authorizes the expulsion of pupils from a public school without notice and a due process hearing prior to such expulsion."

The statute under attack provides as follows:

"The superintendent of schools of a city or exempted village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent or executive head may expel a pupil from school. Such superintendent, executive head, or principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor. The pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion. At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may hold the hearing in executive session but may act upon the expulsion only at a public meeting. The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended or expelled from any school beyond the current semester." OHIO REV. CODE § 3313.66 (Supp. 1969).

Appellant does not contest her suspension from a Cleveland high school, but does complain that she was

expelled from the Cleveland Public Schools without a hearing, in violation of the United States Constitution's requirement of due process of law. Paragraph 10 of her complaint says:

> "Vanessa Calloway was not offered an opportunity, at any time prior to her expulsion, to appear at a hearing to defend herself against the charges raised against her. The plaintiff was afforded no prior notice that the defendant, Paul W. Briggs, was considering expelling her from the Cleveland Public Schools."

In this respect appellant relies primarily upon a Fifth Circuit case wherein that court declared:

> "For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational at-

> mosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled." *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158-59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

This Court cited the *Dixon* case with approval in *Norton v. Discipline Committee of East Tenn. State Univ.*, 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970). *See also Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961).

Appellee, however, contends that appellant on this record should be held to have had a due process hearing before her explusion, and hence, that she has no equitable basis for complaint about the disputed Ohio statute. This is, in essence, the view taken by the District Judge who denied the petition to convene a three-judge court and then dismissed the complaint on the merits. The District Judge accepted as true affidavits filed by appellee and found that appellant was accorded a hearing which provided due process under the circumstances involved. Appellee and the District Judge both point to the limited

requirements for an administrative due process hearing in a school disciplinary case set forth in *Madera v. Board of Education of City of New York*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

In *Madera* the Second Circuit said:

> "The issue is one of procedural 'due process' in its general sense, free from the 'specifics' of the Fifth and Sixth Amendments. What constitutes due process under any given set of circumstances must depend upon the nature of the proceeding involved and the rights that may possibly be affected by that proceeding. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L. Ed.2d 1230 (1961.)" *Madera v. Board of Education of City of New York, supra* at 780.

Accepting these standards, the basic problem we have on this appeal is that appellant claims that she had no hearing before her expulsion and that the Ohio statute which appears to authorize expulsion before a hearing is a violation of federal due process.

Such allegations do in our view raise substantial federal questions. Whether her allegations are correct, of course, is not before us. Nor was it properly before the District Judge. The sufficiency of the complaint for three-judge jurisdictional purposes must be determined by the allegations of the bill of complaint and not by the way the facts turn out. *Mosher v. City of Phoenix*, 287 U.S. 29, 30 (1932); *Ex parte Poresky*, 290 U.S. 30 (1933); *Tyler v. Russell*, 410 F.2d 490 (10th Cir. 1969).

The Supreme Court in 1962 stated the function of the District Judge this way:

> "We agree with the Court of Appeals that a three-judge court should have been convened in this case. When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is

> appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief." *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962). (Footnote omitted.)

Of course, an attack upon a state statute as violative of the Federal Constitution calls for hearing and determination before a three-judge court. 28 U.S.C. §§ 2281; 2284 (1964).

In remand the first issue in this case (and possibly the only one which will need resolution, since this is a complaint seeking individual relief) will be whether or not appellant was prior to her expulsion given a hearing which met due process standards in the context of the fact situation involved. It may be quite possible to resolve this issue on a motion for summary judgment filed before the three-judge court. No motion for summary judgment has as yet been filed and, in any event, could not have been determined by the District Judge. His sole function on receiving this complaint was to determine whether or not its allegations raised a substantial federal question. If so, the determination of fact disputes and the determination of disputed constitutional issues becomes the responsibility of the three-judge court. The statute establishing the three-judge court system says in part:

> "Any one of the three judges of the court may perform all functions, conduct all proceedings, except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not

appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing." 28 U.S.C. § 2284 (1964).

We are not unaware that the Chief Judge of this court has very recently expressed this court's concern over the multiplication of three-judge court proceedings and has urged District Judges to scrutinize petitions for such courts with care. *Jones v. Branigin,* 433 F.2d 576 (6th Cir. 1970). Nonetheless, for the reasons already stated, we do not see how the designation of a three-judge court to determine this case can be avoided.

It may well be that on summary judgment motion before that court, or after a few minutes of sworn testimony on the issues presented here, this case will prove to be as frivolous as the District Judge felt it was. Obviously, however, the resolution of the dispute must be in the legally designated forum.

The dissent in this case sets forth the facts as they are alleged to be in affidavits filed by respondent. But there has been no hearing in this case; the facts recited are not conceded by plaintiff; and no motion for summary judgment has been filed in the court which has jurisdiction. We do not see how respondent's allegations can be held to deprive plaintiff of her right to have a determination of her charges and respondent's countercharges made in the legal forum provided by federal statute.

If, as some of us believe, the statutory mechanism currently established is needlessly expensive in judicial manpower, the cure lies in amendment of the three-judge statute—not in this court's ignoring its terms.

The judgment of the District Court is vacated and the case is remanded to the District Court for invocation of appointment of a three-judge court.

O'SULLIVAN, dissenting.

I respectfully dissent. The opinion of my brothers fails, as did the plaintiff's pleadings in the District Court, to disclose the facts which produced this now ponderous litigation. With much respect for an opposite view, I express my belief that a recital of its background facts will at once disclose that this is vexatious litigation—an unwarranted imposition upon the District Court and upon this Court.

Here are the facts:

On October 20, 1969, Vanessa Calloway, then a student at East Technical High School in the City of Cleveland, Ohio, was discovered carrying a loaded .22 caliber revolver upon the school premises. She announced that it was her intention to shoot one or all of four named female students who, she said, had attempted to obtain money from her, or had otherwise abused her. A safety inspector, employed by the Cleveland Board of Education, discovered Vanessa's possession of the gun. He took possession of it and Vanessa to the office of an Administrative Assistant who was then in charge of East Technical High School. This official made inquiry as to the cause of Vanessa being brought to him. Vanessa acknowledged her possession of the loaded revolver and again expressed her intention to use it if she thought it necessary. Vanessa further disclosed to the Administrator that upon telling her mother of her troubles with the four named girls, her mother obtained and delivered to her the loaded revolver, with advice to use it to shoot all or such of the named girls as necessity required. After conferring with the Acting Prin-

cipal of the high school, the Administrative Assistant advised Vanessa that she was suspended from school for ten days, pending an investigation. She was then escorted to her home by an Attendance Home Visitor employed by the Cleveland Public Schools.

On the same day, the mother of Vanessa—Inez Calloway—was given a full account of the affair. Thereupon, the mother stated that she had, without the knowledge of her employer, taken the gun from such employer and gave it to her daughter with advice to use it if Vanessa deemed it necessary to do so.

Within the month preceding the above events a student at one of the Cleveland High Schools had, on the school premises, shot and killed another student. On a number of occasions guns had been taken from students who were carrying them on the premises of the Cleveland public schools.

A full report of the relevant events was given to Dr. Paul W. Briggs, Superintendent of the Cleveland Public Schools, who caused his own investigation to be made of the affair and on October 23, 1969, and pursuant to Ohio Revised Code, Section 3313.66, notified the parents of Vanessa that she was expelled. The following is the content of the notice:

> "I regret to inform you that I find it necessary to expel your daughter, Vanessa Calloway, from the Cleveland Public Schools. This is being done under the statutory provisions of Section 3313.66 of the Ohio Revised Code.
>
> "The reason for the expulsion is that Vanessa reported to East Technical High School on October 20th with a loaded .22 caliber revolver (serial #152571). Vanessa admitted that she brought the gun to school to use it against four students who had allegedly been threatening her.

"I am delivering this notification to you by way of personal service by one of the attendance workers in the Division of Attendance.

"I am complying with the law by sending a copy of this notice to the Clerk-Treasurer of the Cleveland Board of Education."

The mentioned Ohio statute provides as follows:

"3313.66 Suspension or expulsion.

The superintendent of schools of a city or exempted village, or the executive head of a local school district *may suspend a pupil from school not more than ten days.* Such superintendent or executive head *may expel a pupil from school.* Such superintendent or executive head shall within twenty-four hours after the time of expulsion, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion including the reasons therefor. *The pupil or the parent,* or guardian, or custodian of a pupil so expelled *may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion.* At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may hold the hearing in executive session but may act upon the expulsion only at a public meeting. The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended or expelled from any school beyond the current semester." (Emphasis supplied.)

After such notice had been given, nothing was heard from Vanessa or her parents. On December 4, 1969, three lawyers identifying themselves as attorneys for Vanessa Calloway, met with the Director of Pupil Assignment for the Cleveland Public Schools. One of them was a Lyonel Jones who later appeared as one of the lawyers who com-

menced this litigation. These lawyers were advised that the Ohio statute provided for an appeal and that a hearing would be given to Vanessa if requested. They were told that such a hearing would be had before the Board of Education; that Vanessa could be represented by an attorney; that the Board of Education would provide for the presence at the hearing of any employees of the Board requested by Vanessa's counsel; that the Board's decision would be based only on the evidence presented at such hearing; that if requested a record of such hearing would be prepared and furnished to Vanessa or her counsel. No such hearing was ever requested by the Calloway family or any of their attorneys.

On January 26, 1970, the same Director of Pupil Assignment met with Vanessa Calloway, her parents, and one Snyder who identified himself as attorney for Vanessa and her mother. At this meeting Vanessa was told that she could return to the Cleveland Public Schools. Her lawyer, Snyder, requested that Vanessa be permitted to attend the John Hay High School. He explained that this high school, because of its location and accessibility, was more convenient than East Technical High School, from which Vanessa had been expelled. Thereafter, on February 3, 1970, this same attorney, Snyder, who identified himself as being from the Legal Aid Society, advised the said Director of Pupil Assignment that the family of Vanessa Calloway had decided to accept the school authorities' "offer of an adjustment transfer to John Hay High School." Next day, February 4, 1970, the Director wrote to Vanessa's mother telling of his call from Legal Aid attorney Snyder, which letter concluded with the following:

> "Will you please see that Vanessa returns to the Cleveland Public School System and enters John Hay High School on February 27, 1970?

"I sincerely hope that Vanessa will be happy and that her school experiences will be profitable in John Hay High School."

Notwithstanding the above transactions, and while attorney Snyder, of the Legal Aid Society, the Calloways and the Director of Pupil Assignment were apparently bringing the Calloway affair to a happy conclusion, no less than four other young lawyers of the Cleveland Legal Aid Society were busy preparing this lawsuit. Without any further approach to the school authorities, the product of their endeavors—the complaint before us—was filed in the United States District Court at Cleveland on January 22, 1970.[1]

The foregoing are the controlling facts,[2] but the complaint avoids fair disclosure of them. The complaint recites that on October 23, 1969, Vanessa was expelled from school "for misconduct without first being accorded a hearing at which she could have a fair opportunity to defend herself against the said expulsion." The body of the complaint does not describe the involved misconduct, but in an affidavit attached to the complaint Vanessa says that "She was *suspended* * * * for *allegedly* carrying a concealed weapon in that school."

Procedurally the cause was presented to the District Court upon the plaintiff's application for preliminary in-

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[1] This date is four days prior to the January 26 meeting between attorney Snyder (another Legal Aid Society lawyer) and the Director of Pupil Assignment which apparently brought the Calloway affair to an amicable conclusion. Can it be that the other four Legal Aid lawyers wanted to try out this lawsuit, notwithstanding the amicable disposition of its subject matter?

[2] These facts are set out in affidavits filed by defendant school officers in opposing plaintiff's motion for a preliminary injunction and for the convening of a three-judge court. No denial of their accuracy was made in opposing affidavit or pleading; neither do these attorneys suggest to us that they are otherwise than true.

junction, for the convening of a three-judge court, and for a declaration that Section 3313.66 of the Ohio Revised Code is unconstitutional. The plaintiff was seeking equitable relief. The complaint concluded with a prayer that the Court,

> "award the plaintiff such further relief as may be deemed *just and equitable.*"

Plaintiff's failure to disclose the background facts makes it clear that these attorneys were seeking to have the Ohio school statute declared unconstitutional "on its face" and to have a three-judge court convened to consider the question *in vacuo*. In my view, a court of equity could appropriately have rebuffed this attempt by dismissing the case "out of hand." The defendants resisted the motions by filing answers to the complaint and by filing affidavits which recited the facts set out above. The District Judge considered the matter upon the case made by the pleadings before him. After careful review of the facts disclosed by such pleadings, he concluded:

> "The constitutionality of Ohio Revised Code § 3313.66 is not at issue in this case. The Court finds that plaintiff received an adequate hearing in conformity with due process standards. There is not a substantial federal question presented in this complaint. There appears, moreover, to be no other grounds upon which jurisdiction can be based. Accordingly, the Complaint must be dismissed."

I would affirm such decision for the following reasons:

1) Entertainment of an application for declaratory relief under Title 28, U.S.C. § 2201 is a matter within the discretion of the Court to whom it is addressed. In *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 97 L. Ed. 291 (1952), the Supreme Court said:

> "The Declaratory Judgment Act * * * 28 U.S.C. § 2201 * * * provides that in a case of *actual controversy* a competent court *may* 'declare the rights and other legal relations' of a party 'whether or not further relief is or could be sought.' This is an enabling Act, which confers a *discretion* on the courts rather than an absolute right upon the litigant." 344 U.S. at 241.

Whatever the articulated reason for his action, the District Judge was correct in refusing to entertain this action.

2) I am satisfied that it was permissible for the District Judge to consider the facts disclosed by the affidavits filed in opposition to plaintiff's motions for an injunction and the convening of a three-judge court. My brothers correctly state the general rule that "the sufficiency of the complaint for three-judge jurisdictional purposes must be determined by the allegations of the bill of complaint and not by the way the facts turn out." Where as here, however, the complaint contrived to invoke the jurisdiction of a three-judge court by masking the true facts, the District Judge correctly went beyond the complaint to determine the real controversy and the jurisdiction of a three-judge court, which plaintiff had the burden of showing by well-pleaded facts. See *Gibbs v. Buck,* 307 U.S. 66, 72, 83 L. ed. 1111, 1116 (1938); *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 184, 80 L. ed. 1135, 1138 (1936); *Spears v. Spears,* 162 F(2) 345, 347-48 (6th Cir. 1947).

Rule 43(e) of the Federal Rules of Civil Procedure provides:

> "(e) *Evidence on Motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respec-

> tive parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Upon his consideration of these facts, he properly concluded that "plaintiff received an adequate hearing in conformity with due process standards."

3) In *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962), the Supreme Court said:

> "[T]he court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for *equitable relief*, and whether the case otherwise comes within the requirements of the three judge statute." (Emphasis supplied.)

The complaint filed did not "allege a basis for equitable relief."

> "A declaratory judgment, like other forms of *equitable relief*, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank*, 333 U.S. 426, 431, 92 L. Ed. 784, 789 (1948).

In my view, neither the public interest nor any principle of equity would be served by allowing these attorneys to further impose this case upon a court of equity.

4) My brothers' opinion suggests that a three-judge court be convened, which might consider, upon motion for summary judgment, the same facts which were before the District Judge in the form of affidavits, and that on such a proceeding "the case will prove to be as frivolous as the District Judge felt it was." To what avail the current cry for reform and the unburdening of an already overburdened federal court system if we are to indulge such wasteful formalism. Chief Judge Phillips' able

discussion of the dangerous increase in these impositions on the federal courts is indeed applicable here. See *Jones v. Branigan,* 433 F(2) 576 (6th Cir. 1970). In *California Water Service v. Redding,* 304 U.S. 252, 82 L. Ed. 1323 (1938), the Supreme Court early forecast what *Jones v. Branigan,* finds has come to pass. I do not believe that equity should entertain frivolous use of the Declaratory Judgment Act, 28 U.S.C. § 2201, and routinely convene a three-judge court under § 2281 just to provide a forum for the useless legal jousting which plaintiff's attorneys desire. In *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 78 L. ed. 1318 (1934), the Supreme Court said:

> "The three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended. * * * The limitations of the statute would be defeated were it enough to keep three judges assembled that a plaintiff could resort *to a mere form of words in his complaint* alleging that the suit is one to restrain action of state officers, *with no support whatever in fact or law.*" 78 L.ed. 1322. (Emphasis supplied.)

In *Samuels v. Mackell,* ___ U.S. ___, 39 U.S.L. Week 4211 (Feb. 23, 1971), the Supreme Court emphasized that declaratory relief must be obtained from the equity side of the court.

> "In addition, the legislative history of the Federal Declaratory Judgment Act of 1934, 48 Stat. 955, as amended, 28 U.S.C. § 2201, showed that Congress had explicitly contemplated that the courts would decide to grant or withhold declaratory relief on the basis of *traditional equitable principles.* Accordingly the Court held that in an action for a declaratory judgment, 'the district court was as free as in any other suit in equity

to grant or withhold the relief prayed, *upon equitable grounds.*" (Emphasis supplied.)

This litigation has already used up the time and talents of one of the judges and the staff of the United States District Court. In the appeal to us, three judges of this Court, maintained at government expense, aided by various attaches of this court, also provided at government expenses, have given attention to what I believe is vexatious litigation. I think that it should end here without sending it back to convene three more judges to do what we can do now. See *Green v. Board of Elections*, 380 F(2) 445, 449 (2d Cir. 1967); *Heaney v. Allen*, 425 F(2) 869, 872 (2d Cir. 1970).

An independent judiciary is essential to our free society. Such a judiciary will remain only so long as it respects the constitutional prerogatives of its coequals in the grand scheme of our government. If, however, we invite restraints by the ever-multiplying intrusion of our writs to control discharge of the functions of every school officer and others who have the responsibility for direction of local government, we will indeed invite reprisals, justly imposed upon us by our coequals. It is inconceivable to me that only by our leave can local school officers summarily suspend and expel a high school student who shows up at school with a loaded revolver and advises of her intention to use it.

I would affirm.

JUDGMENT OF THE COURT OF APPEALS.

(Filed May 24, 1971.)

No. 20,471.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

VANESSA CALLOWAY,
a minor by her mother and next friend,
INEZ CALLOWAY,
Plaintiffs-Appellants,

vs.

PAUL W. BRIGGS,
Superintendent of Schools,
Cleveland School District, *et al.*,
Defendants-Appellees.

BEFORE: EDWARDS and MILLER, Circuit Judges and O'SULLIVAN, Senior Circuit Judge.

JUDGMENT.

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case is remanded to the District Court for invocation of appointment of a three-judge court.

No costs awarded inasmuch as this appeal is In Forma Pauperis.

Entered by order of the Court.
CARL W. REUSS,
Clerk:

Issued as Mandate: July 29, 1971.

ORDER ON MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

(Filed July 19, 1971.)

No. 20,471.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

VANESSA CALLOWAY,
a minor by her mother and next friend,
INEZ CALLOWAY,
Plaintiffs-Appellants,

vs.

PAUL W. BRIGGS,
Superintendent of Schools,
Cleveland School District, *et al.*,
Defendants-Appellees.

BEFORE: EDWARDS and MILLER,* Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

Defendants-Appellees' motion for permission to file a delayed motion for rehearing and a delayed suggestion for rehearing en banc having been considered, the same is hereby denied.

Entered by order of the Court.
/s/ JAMES A. HIGGINS,
Clerk.

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* Judge Miller did not participate in the disposition of this motion.